

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	:	
	:	
v.	:	CR No. 15-003S
	:	
ALFRED PERRY	:	

REPORT AND RECOMMENDATION

Lincoln D. Almond, United States Magistrate Judge

This matter has been referred to me pursuant to 28 U.S.C. § 636(b)(1)(B) and 18 U.S.C. § 3401(i) for proposed findings of fact concerning whether Defendant is in violation of the terms of his supervised release and, if so, to recommend a disposition of this matter. In compliance with that directive and in accordance with 18 U.S.C. § 3583(e) and Fed. R. Crim. P. 32.1, a revocation hearing was held on July 5, 2017, at which time Defendant, through counsel and personally, admitted that he was in violation of his supervised release conditions as to the charged violations. At this hearing, I ordered Defendant detained pending my Report and Recommendation and final sentencing before Chief Judge William E. Smith.

Based upon the following analysis and the admission of Defendant, I recommend that Defendant be committed to the Bureau of Prisons for a term of incarceration of fourteen months with no further supervised release.

Background

On July 5, 2017, the Probation Office petitioned the Court for the issuance of an arrest warrant. On that date, the District Court reviewed the request and ordered the issuance of an arrest

warrant. On July 5, 2017, Defendant was brought before the Court for a revocation hearing at which time he admitted to the following charges:

Violation No. 1. Defendant shall refrain from any unlawful use of a controlled substance.

Defendant used buprenorphine as evidenced by positive drug tests on November 28, 2016; December 12, 2016; January 3, 2017; January 9, 2017; January 19, 2017 and January 27, 2017. In addition, Defendant used cocaine as evidenced by positive drug tests on December 12, 2016; February 6, 2017 and May 15, 2017. Lastly, Defendant used Amphetamines as evidenced by a positive drug test on January 19, 2017.

Violation No. 2. Defendant shall participate in a program of substance abuse testing (up to seventy-two tests per year) as directed and approved by the Probation Office. Defendant shall contribute to the costs of such testing based on ability to pay as determined by the Probation Officer.

On January 4, 2017; January 30, 2017; March 20, 2017; March 31, 2017 and May 12, 2017 Defendant failed to report to the Probation Office in accordance to the Random Drug Testing Program.

Violation No. 3. While on supervision, Defendant shall not commit another federal, state or local crime.

On April 6, 2017 Defendant committed the offense of Driving Under the Influence of Alcohol as evidenced by his arrest by Charlestown Police on that date.

Violation No. 4. Defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any controlled substance or any paraphernalia related to any controlled substance, except as prescribed by a physician.

On April 6, 2017, Defendant used alcohol excessively as evidenced by his arrest by the Charlestown Police on that date.

Violation No. 5. Defendant shall participate in a program of substance abuse treatment (inpatient or outpatient), as directed and approved by the Probation Office. Defendant shall

contribute to the costs of such treatment based on ability to pay as determined by the Probation Officer.

Defendant failed to complete the Phoenix House inpatient treatment program as evidenced by his arrest on May 21, 2017 and subsequent removal from the Program.

Violation No. 6. While on supervision, Defendant shall not commit another federal, state or local crime.

On May 21, 2017 Defendant committed the offense of Disorderly Conduct as evidenced by his arrest by the Rhode Island State Police on that date.

Violation No. 7. While on supervision, Defendant shall not commit another federal, state or local crime.

On May 30, 2017 Defendant committed the offenses of Resisting Arrest and Disorderly Conduct as evidenced by his arrest by the Pawtucket Police on that date.

As Defendant has admitted these charges, I find he is in violation of the terms and conditions of his supervised release.

Recommended Disposition

Section 3583(e)(2), 18 U.S.C., provides that if the Court finds that Defendant violated a condition of supervised release, the Court may extend the term of supervised release if less than the maximum term was previously imposed. The maximum term of supervised release was previously imposed, therefore, the term cannot be extended.

Section 3583(e)(3), 18 U.S.C., provides that the Court may revoke a term of supervised release and require the Defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term or supervised release without credit for time previously served on post release supervision, if the Court finds by a preponderance of evidence that the defendant has violated a condition of supervised release, except that a defendant

whose term is revoked under this paragraph may not be sentenced to a term beyond 5 years if the instant offense was a Class A felony, 3 years for a Class B felony, 2 years for a Class C or D felony, or 1 year for a Class E felony or a misdemeanor. If a term of imprisonment was imposed as a result of a previous supervised release revocation, that term of imprisonment must be subtracted from the above-stated maximums to arrive at the current remaining statutory maximum sentence. Defendant was on supervision for a Class C felony. Therefore, he may not be required to serve more than two years' imprisonment upon revocation.

Pursuant to 18 U.S.C. § 3583(h) and § 7B1.3(g)(2), when a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized, the Court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release. The authorized statutory maximum term of supervised release is three years. There has been a total of seven months' imprisonment previously imposed for violations of supervised release. Therefore, the Court may impose the above-noted statutory maximum, minus the seven months previously imposed, minus the term of imprisonment that is to be imposed for this revocation.

Section 7B1.1 of the Sentencing Guidelines provides for three grades of violations (A, B, and C). Subsection (b) states that where there is more than one violation, or the violation includes more than one offense, the grade of violation is determined by the violation having the most serious grade.

Section 7B1.1(a) notes that a Grade A violation constitutes conduct which is punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device; or any other offense punishable by a term of imprisonment exceeding twenty years. Grade B violations are conduct constituting any other offense punishable by a term of imprisonment exceeding one year. Grade C violations are conduct constituting an offense punishable by a term of imprisonment of one year or less; or a violation of any other condition of supervision.

Section 7B1.3(a)(1) states that upon a finding of a Grade A or B violation, the Court shall revoke supervision. Subsection (a)(2) provides that upon a finding of a Grade C violation, the court may revoke, extend, or modify the conditions of supervision. Defendant has committed Grade C violations, and the statutory maximum term of supervised release has already been imposed. Therefore, the Court may not extend supervision, but may revoke or modify supervision.

Section 7B1.3(c)(1) provides that where the minimum term of imprisonment determined under § 7B1.4 is at least one month, but not more than six months, the minimum term may be satisfied by (A) a sentence of imprisonment; or (B) a sentence that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in § 5C1.1(e) for any portion of the minimum term. Should the Court find that Defendant has committed a Grade B or C violation, § 7B1.3(c)(2) states that where the minimum term of imprisonment determined under § 7B1.4 is more than six months but not more than ten months, the minimum term may be satisfied by (A) a sentence of imprisonment; or (B) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in §5C1.1(e), provided that at least one-

half of the minimum term is satisfied by imprisonment. The second provision which allows for alternatives for one-half of the minimum term applies to this matter.

Section 7B1.3(d) states that any restitution, fine, community confinement, home detention, or intermittent confinement previously imposed in connection with the sentence for which revocation is ordered that remains unpaid or unserved at the time of revocation shall be ordered to be paid or served in addition to the sanction determined under § 7B1.4 (Term of Imprisonment), and any such unserved period of confinement or detention may be converted to an equivalent period of imprisonment. Defendant owes \$12,905.80 in restitution.

Section 7B1.4(a) provides that the criminal history category is the category applicable at the time Defendant originally was sentenced. Defendant had a Criminal History Category of VI at the time of sentencing.

Should the Court revoke supervised release, the Revocation Table provided for in § 7B1.4(a) provides the applicable imprisonment range. Defendant committed Grade C violations and has a Criminal History Category of VI. Therefore, the applicable range of imprisonment for this violation is eight to fourteen months.

Section 7B1.5(b) of the USSG provides that, upon revocation of supervised release, no credit shall be given toward any term of imprisonment ordered, for time previously served on post-release supervision.

Offender's Characteristics

In 2007, Defendant was convicted in the District of Massachusetts of stealing firearms from a licensed dealer. He received a ninety-six month sentence and commenced a thirty-six month term of supervised release on March 28, 2014. This is Defendant's third violation case. Defendant first

received a thirty-day violation sentence on September 4, 2014 for noncompliance, primarily related to substance abuse issues.

He recommenced supervised release on September 16, 2014. After completing a stint at the Coolidge House, jurisdiction was transferred to this District on January 13, 2015 and Defendant was accepted into the HOPE Court Program. Defendant participated in HOPE Court for approximately sixteen months. He reportedly made some progress in HOPE Court and diligently attempted to address his addiction issues. He had secured regular employment and was participating in a medication-assisted, drug-treatment program.

On May 27, 2016, Defendant was arrested in Charlestown, Rhode Island, and charged with domestic assault. The charge triggered his second violation case, and Defendant's separation from HOPE Court. The circumstances were troubling. In the early morning hours of Friday, May 27, 2016, Charlestown police responded to a report of domestic assault at the residence of a thirty-three year old adult female. Also present were Defendant, the female's ex-husband, and their seven year old son. According to the police report, police had responded to the home approximately thirty minutes earlier because Defendant had short-changed a taxi driver. Defendant was in some form of a relationship with the female but apparently was uninvited and unwelcome when he arrived at her home that night. According to the police report, the female victim was "crying hysterically" on the scene and stated that Defendant "never hit me like this before." She wanted Defendant out of her house but did not want him to go to jail. The seven year old boy spoke to police and said that the victim's and Defendant's yelling woke him up. He told the officer that he saw Defendant punching the victim, his mother, in the face and later dragging her by her hair into another room.

Defendant admitted to that violation charge in the context of a "plea agreement" on a six-month joint sentencing recommendation which was accepted by the Court. He was also ordered to

refrain from contact with the victim unless the State No-contact Order (“NCO”) was lifted and he was authorized by Probation. Defendant was never authorized to have contact with the victim, although the State NCO was apparently lifted.

This third violation is even more troubling than the second and warrants a significant punishment, primarily to protect public safety. Defendant recommenced supervision on November 25, 2016 and promptly returned to abusing alcohol and drugs including cocaine and amphetamines. He picked up three new arrests. First, on April 6, 2017, he was arrested and subsequently convicted of Driving Under the Influence in Charlestown, Rhode Island. According to the Police Report, Defendant was speeding and driving erratically while impaired. Second, he was arrested on May 21, 2017 and subsequently convicted of disorderly conduct. The incident took place during a period of inpatient drug treatment, and Defendant was removed from the Program as a result. Finally, on May 30, 2017, Defendant was arrested by the Pawtucket Police and charged with two counts of domestic violence, one count of resisting arrest and one count of disorderly conduct. Ultimately, Defendant was convicted of resisting arrest and disorderly conduct. According to the Police Reports, Defendant was with the same female victim from the May 27, 2016 Charlestown incident.¹ Defendant had reportedly struck the female victim several times, and she had visible injuries. Defendant initially evaded police by climbing up to a second-floor balcony. He was hostile and threatening towards police and requested that the officers shoot him. Defendant jumped to the ground, and officers used a Taser on Defendant in order to take him into custody. Needless to say, Defendant’s behavior put the victim, himself, the public and law enforcement in danger by prompting the use of force.

¹ Although not charged as an additional violation, Defendant’s unauthorized contact with the victim was technically a violation of his special conditions of supervised release.

At the hearing, the Government recommended a high-end sentence of fourteen months with no further supervised release or, alternatively, a twelve-month sentence with further supervision. Defendant's counsel initially indicated that Defendant was trying to get admitted to inpatient treatment at Butler Hospital prior to the incident and argued for release to allow him to do so. If the Court was disinclined to release Defendant, his attorney alternatively argued for a low- or mid-range sentence.

This is Defendant's third violation, and the guideline range is eight to fourteen months. Defendant received an arguably lenient six-month sentence for his second violation arising out of a domestic violence incident. Since then, he has had three new arrests including a DUI and another domestic violence incident with the same victim. Defendant has long-standing substance abuse and mental health issues. However, his recent behavior at a residential treatment facility resulted in his arrest for disorderly conduct and expulsion from the Program. Thus, I cannot accept Defendant's request for release and referral to inpatient treatment. He is abusing drugs and alcohol and engaging in criminal behavior that presents a danger to the community. A period of incarceration is warranted, and I recommend the high-end of the guideline range – fourteen months. As to further supervised release, I do not recommend any. The Court's Probation Office has expended substantial resources on Defendant without any appreciable benefit. He remains subject to State terms of suspended sentences and probation for his recent convictions.

Conclusion

Based on Defendant's admission of the charges and considering the sentencing factors set forth in 18 U.S.C. § 3553(a), I recommend that Defendant be committed to the Bureau of Prisons for a term of incarceration of fourteen months with no further supervised release.

Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of Court within fourteen days of its receipt. Fed. R. Crim. P. 59; LR Cr 57.2. Failure to file specific objections in a timely manner constitutes a waiver of the right to review by the District Court and the right to appeal the District Court's Decision. United States v. Valencia-Copete, 792 F.2d 4 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980).

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
July 11, 2017